IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 15.02.2005

Coram:

The Honourable Mr.MARKANDEY KATJU, Chief Justice

and

The Honourable Mr.Justice D.MURUGESAN

Writ Appeal No. 3995 of 2004 and
Writ Petition Nos. 36203 & 36204 of 2003
and
W.P.M.P.Nos. 43943 & 43944/2003

Tvl.Pizzeria Fast Foods Restaurant
(Madras) Pvt. Ltd.,
No.85, Santhome High Road,
Chennai - 600 028. … Appellant in WA. No.3995/04

vs.

1. Commissioner of Commercial Taxes
Ezhilagam, Chepauk,
Chennai - 600 005.

2. Commercial Tax Officer,
Valluvar Kottam Assessment Circle,
Chennai - 600 006.

3. Tamil Nadu Taxation Special Tribunal
rep. by its Registrar,
2nd floor, Singaravelar Maligai,
Chennai. … Respondents in WA.No.3995/04

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W.P.No. 36203 & 36204 of 2003

Tvl.Pizzeria Fast Foods Restaurant
(Madras) Pvt. Ltd.,
G 2/3, Gee Gee Emerald,
312, Valluvar Kottam High Road,
Chennai - 600 034. ... Petitioner in both the petitions.

vs.

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1. Tamil Nadu Taxation Special Tribunal
Singaravelar Maligai II Floor,
Chennai.
Rep. by its Registrar.

2. Commissioner of Commercial Taxes,
Ezhilagam, Chepauk,
Chennai – 600 005.

3. Commercial Tax Officer,
Valluvar Kottam Assessment Circle,
Chennai – 600 006. …Respondents in both the petitions.

Appeal filed under Clause 15 of the Letters Patent against the order passed in W.P.No.6266 of 2004 dated 16.03.2004 and writ petitions filed under Article 226 of the Constitution of India praying for the issue of writ of certiorari for the reasons stated therein.

For appellant in W.A. & petitioner in W.Ps ::: Mr.Arvind P. Datar
Senior counsel for
M/S.MR.Raghavan,
R.Venkata Varadan and
N.Murali.

For Respondents in both the writ appeal & writ petitions ::: Mr.T.Ayyasamy
Govt.Pleader(Taxes)

J U D G M E N T

THE HONOURABLE THE CHIEF JUSTICE

Heard the learned counsel for the parties.

2. Writ Petition No. 36203 of 2003 has been filed for a writ of certiorari to quash the impugned order passed by the first respondent, the Tamil Nadu Taxation Special Tribunal, Chennai in O.P.No.918 of 2003 dated 24.11.2003.

3. Writ Petition No. 36204 of 2004 has been filed for a writ of certiorari to quash the impugned order passed by the first respondent in O.P.No.1347 of 2003 dated 24.11.2003. The Tribunal has passed common order in both the above cases. Before the Tribunal, the petitioner sought to quash the impugned clarification No.156 of 2003 in D.Dis.Acts. Cell-II/31073/2003 dated 26.06.2003 issued by the Commissioner of Commercial Taxes under Section 28-A of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as 'the Act').

4. The Tribunal dismissed both the petitions for assessment years 1999-2000 and 2000-2001 on the ground that the clarifications are binding on the parties, and

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alternatively it was open to the petitioner to challenge the correctness of the clarification before the statutory authorities under the Act.

5. Writ Appeal No.3995 of 2004 has been filed against the impugned order of the learned single Judge dismissing W.P.No.6266 of 2004 on the ground of alternative remedy under the Act. It has been pointed out in the writ appeal that the learned single Judge was wrong in dismissing the writ petition on the ground of alternative remedy, since the assessment order has been passed on the basis of the clarification dated 26.06.2003 under Section 28-A of the Act and the said clarification issued by the first respondent is the subject matter of challenge before this Court in W.P.Nos.36203 & 36204 of 2003.

6. The facts of the case are that the petitioner is a private limited company and runs a chain of fast food restaurants under the name and style "Pizza Hut". The petitioner company sells pizza and other food preparations at its restaurants. It also provides hot and cold beverages like soft drinks, tea, coffee etc. The petitioner has been registered as a dealer under Tamil Nadu General Sales Tax Act, 1959. It is alleged that initially the assessments of the petitioner were completed for the assessment years 1999-2000 and 2000-2001 by levying sales tax under Section 3D of the Act, which specifically applies to hotels and restaurants. It is alleged that until 01.04.2004, the levy of sales tax on the sale of food and drinks in any hotel was at a flat rate of 2%. Section 3D applies to all hotels/restaurants wherein the total turnover was not less than Rs.25 lakhs, but, Star Hotels were subject to a higher rate of tax. It is alleged that after the assessments were completed, the petitioner received pre-revision notices on 25th June 2002 calling upon it to show cause as to why the assessments for both years should not be revised and the sale of pizza should not be taxed at 16% as against the initial levy of 2%. The petitioner filed its objections before the third respondent/Commercial Tax Officer, Valluvar Kottam Assessment Circle, Chennai - 600 006. The third respondent/Commercial Tax Officer pointed out that the pre-revision notices were on the basis of a clarification dated 16.03.2002 which directed that branded pizza should be taxed at 16% and unbranded pizza at 8% and this clarification was issued by the Commissioner of Commercial Taxes (second respondent in the writ petitions). The same view was reiterated in another clarification dated 20.12.2002.

7. In view of the above two earlier clarifications dated 16.3.2002 and 20.12.2002, the petitioner sought for a clarification from the second respondent under Section 28-A of the Act, as to the proper rate of tax. The request for clarification was filed in terms of Form XIV under Rule 26A of the Tamil Nadu General Sales Tax Act Rules. In the said

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application, the petitioner pointed out that until 01.04.2002, Section 3D of the Act read: -

> " Section 3D. Payment of tax by hotels, restaurants and sweet stalls: -
> (1) Notwithstanding anything contained in sub-section(1) of Section 3 every dealer whose total turnover is not less than twenty five lakhs of rupees for the year on the first point of sale of food and drinks in hotels, restaurants, sweet stalls and any other eating houses other than those falling under item 20 of PART-C of the first schedule, shall pay tax at the rate of 2 per cent on the taxable turnover.
> Explanation:- For the purpose of computing the total turnover under the sub-section, the purchase turnover liable to tax under Section 7-A shall be added to the sales turnover"

8. The contention of the petitioner was that before 01.04.2002, Section 3D made no distinction between branded and unbranded food and drinks. Sale of all types of food and drinks in hotels and restaurants would be taxed only at 2% of the taxable turnover, except star hotels. Therefore, it would not be proper to levy sales tax at 16% on pizza by treating them as branded goods under Entry 4(iii), Part-E of the First Schedule.

9. The petitioner also pointed out that Section 3D was drastically amended on 01.04.2002, and after the amendment, it read as: -

> " Section 3-D. Payment of tax by hotels, restaurants and sweet stalls: -
> (1) Notwithstanding anything contained in sub-section (1) of Section 3, every dealer whose total turnover is not less than ten lakhs of rupees for the year shall pay tax at the rate of two per cent on the first point of sale of ready to eat unbranded goods including sweets, savouries, unbranded non-alcoholic drinks and beverages served in or catered indoors or outdoors by hotels, restaurants, sweet stalls, clubs, caterers and any other eating house other than those falling under item 29 of the Part-C of the first schedule.
> Explanation (1): - For the purpose of computing the total turnover under this sub-section, the purchase turnover liable to tax under Section 7-A shall be added to the sales turnover.

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> Explanation (2): - For the purpose of computing the total turnover under this sub-section, the sales turnover of all business units in a common premises sharing the common kitchen or common employees shall be added to the sale turnover of the business unit having higher turnover."

10. The petitioner contended that the amended section levied sales tax at 2% on unbranded foods and drinks served in hotels and restaurants, and therefore, the distinction between branded and unbranded foods thus became applicable only after 01.04.2002.

11. The petitioner further submitted that even after the amendment, the pizzas sold by it are not branded with any mark or name. Pizzas are sold in restaurants just like idly, dosa, vada, etc. Sale of these products in a restaurant cannot be treated as a sale of 'branded food'.

12. In response to the petitioner's request the Commissioner/second respondent issued the impugned clarification no.156/2003 dated 26.06.2003. The clarification refers to the pleas raised by the petitioner, and the operative portion of the clarification reads: -

> " It is seen that the restaurant Tvl.Pizza Hut, have registered their products under Trade and Merchandise Marks Act, 1958 for pizza, pie preparations made from cereals, for food for human consumption. Therefore, sale of the branded products registered under TMM Act, such as pizza, etc. falls outside the ambit of Section 3D of the Act, and is, therefore, taxable at 16% under Entry No.3(1) in Part-E of the first schedule to the TNGST Act 1959. For the period prior to 01.04.2002 also, the liability is under Entry No.4 (iii) of Part-E of the First Schedule to the TNGST Act, 1959, taxable at 16%."

13. The petitioner aggrieved by this clarification filed O.P.Nos.918 and 1347 of 2003 before the Tribunal to quash the above clarification no.156 of 2003. The Tribunal dismissed the petitions on the ground that the clarification issued under Section 28-A of the TNGST Act could be challenged before the assessing authority. The Tribunal held that even if the assessing authority passed an order against the assessee, the same should be assailed only in the appeal. The Tribunal referred to its own Full Bench decision in O.P.Nos.1334 and 1336 dated 25.01.2001, which stated that whatever be the clarification issued, it would bind the parties who had sought for the clarification. The Tribunal also referred to an earlier decision of the Division Bench of this Court in

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W.P.No.10709 of 1999 which stated that a clarification issued under Section 28A of the TNGST Act could be assailed in appeal as well as before the assessing officer on the basis of proper evidence. Therefore, without going into the merits of the clarification, the Tribunal declined to interfere and dismissed the petitions.

14. Learned senior counsel for the petitioner Mr.Arvind Datar submitted that the impugned clarification is contrary to the statutory provisions of Section 3D of the Act as applicable prior to 01.04.2002, and the section, as extracted above, levied a flat rate of tax of 2% on the sale of all food and drink in hotels with turnover of more than Rs.25 lakhs per annum, whereas the sale of food and drinks in star hotels is taxed at a higher rate. It is also submitted by the learned senior counsel that Section 3D, the charging section, made no distinction between the branded or unbranded food. It is only after it was amended on 01.04.2002 that the section levied a flat tax at 2% on unbranded food and drinks in hotel and restaurants.

15. Learned senior counsel further submitted that the Tribunal was not justified in holding that the clarification could be challenged before the assessing officer and the appellate authorities under the Act. He contended that the clarification/circulars are binding on all the officers in the department, and hence, directing the petitioner to challenge the correctness of the circular before the assessing authority or appellate authority would be an exercise in futility, because the Commissioner of Commercial Taxes, who issued the circular, is a higher authority than the assessing officer or appellate authority.

16. In order to substantiate his contentions, learned senior counsel for the petitioner referred to several decisions of the Supreme Court, as well as other High Courts.

17. In Filterco v. CST, (1986) 2 SCC 103, the Supreme Court was concerned with a clarification issued under Section 42B of the Madhya Pradesh General Sales Tax Act, 1958. The above section empowered the Commissioner to make an order determining the rate of tax on such goods in the case of any dispute. Like Section 28-A of the Tamil Nadu Act, the order passed by the Commissioner was binding on all the authorities except the appellate authority. In that case, the High court dismissed the writ petition on the ground that the assessee had an alternate remedy by way of appeal under the Act. The Supreme Court held that the High Court ought not have dismissed the writ petition in such a case. It observed that the order passed by the Commissioner would be binding on the assessing authorities, and although technically it would be open to the assessee to file an appeal, it would be a mere exercise in futility when a

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superior officer like the Commissioner passed an order determining the rate of tax.

18. In Union of India v. Ahmedabad Electricity Company Ltd., (2003) 158 ELT 3 = (2003) 134 STC 24 an objection was raised that the writ petition against a circular ought not to be entertained. The Supreme Court held that once a circular is issued, any objection to the same before a subordinate officer would be a futile attempt. It was further held that the impugned circular could not have been challenged before the departmental authorities as they would be bound by it, and accordingly, the High Court, was entitled to entertain the writ petition challenging the circular under Article 226 of the Constitution of India. Even though the above said decision was rendered in the context of the Central Excise Act, in our opinion the same principle would apply to the petitioner's case.

19. Similarly, in Vam Organic Chemicals Ltd. v. State of Uttar Pradesh, (2003) 132 STC 8 the Allahabad High Court held that when the subordinate authorities are bound by a circular, no purpose will be served by asking the petitioner to appear before the assessing authority who will feel bound by the circular issued by the Government of Uttar Pradesh.

20. In Sri Rajarajeswari Parboiled Rice Industry v. CTO, (1999) 115 STC 99, the Andhra Pradesh High Court held that a circular which is binding on the assessing authority will also inhibit the appellate authority from taking a different view. Even if the statutory provision states that the Commissioner's circular is not binding on the appellate authority, he is administratively subordinate to the Commissioner and therefore, will be inhibited from taking a different view. The Andhra Pradesh High Court followed the decision of the Supreme Court in Filterco v. CST (supra).

21. A similar view was taken by the Karnataka High Court in Arif Transport v. CTO, (1999) 116 STC 207.

22. In another decision of the Andhra Pradesh High Court, it was held that once the highest authority constituted under the Act has pre-determined the question and directed all subordinate authorities to interpret a notification in a particular manner, the statutory remedy of appeal and revision ceased to be an effective alternative remedy (vide Etikoppaka Co-operative Agricultural Society Ltd., v. Union of India, 1979 ELT (J533).

23. Learned senior counsel also relied on the decision of this Court in Madras Bar Association v. Central Board of Direct Taxes, (1995) 216 ITR 240. In the above decision, this Court was concerned with a circular issued by the Central Board of Direct Taxes which sought to bring contracts for rendering professional services within the purview of Section 194C of the Income Tax Act, 1961 requiring deduction of income tax at source. The circular

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expanded the scope of Section 194C. The counsel for the department had submitted that the correctness of the circular could be canvassed before the assessing authorities. Alternatively, the assessing authorities could be directed to dispose off the assessment without reference to the circular. This Court held that such a direction or disposal would not do any real or effective justice to the parties who have approached the Court, and the threat imposed by such circulars was real and substantial and had the consequence and effect of a constrained influence on the authorities functioning under the Act. This Court further held that having regard to the authority which issued the circular and the source of power, the threat could not be completely erased except by quashing and setting aside the circular.

24. Before dealing with the questions involved in these cases, we may refer to Section 28-A of the Act, which states: -

> "Power to issue clarification by Commissioner of Commercial Taxes: -
>
> (1) The Commissioner of Commercial Taxes on an application by a registered dealer, may clarify any point concerning the rate of tax under the Act. Such clarification shall be applicable to the goods specified in the application.
>
> Provided that no such application shall be entertained unless it is accompanied by proof of payment of such fee, paid in such manner, as may be prescribed.
>
> (2) The Commissioner of Commercial Taxes may, if he considers it necessary or expedient so to do, for the purpose of uniformity in the work of assessment and collection of tax, clarify any point concerning the rate of tax under this Act or the procedure relating to assessment and collection of tax as provided for under this Act.
>
> (3) All persons working under the control of Commissioner of Commercial Taxes shall observe and follow the clarification issued under sub-section (1) and sub-section (2)"

Amendment to the above Act was inserted from 6.11.1997 by the Tamil Nadu General Sales Tax (6th Amendment) Act, 1997.

25. A perusal of the above provision shows that the Commissioner can clarify any point concerning the rate of tax under the Act, and in view of sub-section (3) all persons working under the control of the Commissioner have to observe and follow the clarification issued by him. In our opinion, this power of the Commissioner to issue

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clarification does not mean that the Commissioner can override or amend provisions of the Act or rules made thereunder.

26. It may be noted that a clarification can only be issued on an application by a registered dealer regarding the rate of tax on any goods. It seems that the purpose of inserting Section 28-A was that some businessmen wanted to know their tax liability, so that they could make financial and other arrangements accordingly. In a business, a businessman has to do planning so that he can earn profits. For doing such planning, he obviously would like to know what would be his tax liability so that he can take it into account when doing his financial planning for the business. Hence, for the above said purpose, he can apply to the Commissioner to clarify any point regarding the rate of sales tax on a taxable commodity.

27. It may be noted that the rates of tax are mentioned in the Schedules to the Act. The charging sections are Section 3 and other following provisions of the Act. It is well settled that a Schedule to an Act is part of the Act itself and hence has statutory force. The Commissioner, who is only an executive authority, cannot over-ride the provisions of the Act itself. That being so, in our opinion, the direction issued by the Commissioner under Section 28-A of the Act cannot override the rate of tax fixed in the Schedules to the Act.

28. As regards, sub-section (3) of Section 28-A, in our opinion this provision only means that when the sales tax authorities are fixing the rate of tax in their executive capacity, they shall follow the circular of the Commissioner under Section 28-A. However, when the sales tax authorities are acting in a judicial or quasi-judicial capacity, in our opinion, they cannot be bound by the order of the Commissioner, because to take a contrary view would mean interference by the executive in a judicial function. When the assessing authority under the Sales Tax Act (or the appellate authority) decides a case, he is functioning in a judicial capacity (even though he may be a sales tax authority). Hence, when he is acting in a judicial capacity, he should not feel bound by any clarification issued by the Commissioner, as such clarifications under Section 28-A are not binding on him when he is functioning in a judicial capacity, and they are only binding when he is functioning in an administrative capacity, when initially fixing the rate of tax on a specific commodity.

29. In Kerala Financial Corporation v CIT, (1994) 210 ITR 129, the Supreme Court held that the circulars issued by the Central Board of Direct Taxes under Section 119 of the Income Tax Act, 1961, could not override or detract from the provisions of the Act, as that would be destructive of all known principles of law and would be giving a power to the executive authority to amend the provisions of the Act. In our opinion, the same principle

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will apply to Section 28-A of the Act also. The Commissioner cannot take a view which is contrary to the provisions of the Act or rules made thereunder as interpreted by the Courts or the statutory authorities under the Act when they are performing judicial or quasi judicial functions (vide Sales Tax Officer v. Shree Durga Oil Mills Ltd, 1998 (97) ELT 202 (206).

30. In our opinion, though the circular issued by the Commissioner under Section 28-A is not binding on the assessing authority or appellate authority, yet we cannot overlook the fact that since the Commissioner is a superior authority to the assessing officer or appellate authority, it would be impracticable to expect the subordinate authority to take a view contrary to the view expressed by the Commissioner. Hence, in our opinion, the plea of alternative remedy cannot be accepted in such a case, and if the petitioner contends that the clarification has been issued contrary to the provisions of the Act or rules made thereunder, it will always be open to question the same under Article 226 of the Constitution of India.

31. In the present case, the petitioner was served with a pre-revision notice on the basis of a circular issued on 18.3.2002, which stipulated that branded pizza could be taxed at 16%. Accordingly the assessments which had been initially completed and which levied a tax of 2% under Section 3D of the Act were sought to be revised and tax at 16% was proposed to be levied. A plain reading of Section 3D, as it existed prior to 01.04.2002, indicates that it levies a tax on all foods and drinks sold in hotels and restaurants having a total turnover of not less than Rs.25 lakhs at a flat rate of 2%. The section made no distinction as to whether the food and drink that was sold was branded or unbranded. Section 3D introduced the concept of sale of unbranded good and drink only in the amended provisions, which came into effect on 01.04.2002. Hence, in our opinion, it was clearly not permissible for the Commissioner of Commercial Taxes to issue a clarification that branded pizza would be taxed at 16%.

32. As pointed out by the Supreme Court in the Kerala Financial Corporation Ltd. case (supra) this would really tantamount to amending the TNGST Act itself by a clarification issued under Section 28-A. A direction to levy tax at 16% when the charging section prescribes a flat rate of 2% is, in our opinion, not permissible. The impugned clarification is clearly contrary to the provisions of Section 3D as it stood prior to 01.04.2002. Therefore, the impugned clarification no.156/2003 dated 26.6.2003 is liable to be quashed.

33. In the present case, the Tribunal has referred to a decision of its own Full Bench in O.P.Nos.1334 to 1336 of 2000 dated 25.01.2001. In that case, it was held that the clarification would bind the party which sought for it, but at the same time it would be open to the assessee to

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canvass the correctness of the clarification before the assessing officer or the appellate authority. In the impugned order of the Tribunal, reference was also made to a decision of a Division Bench of this Court in W.P.No.10709 of 1999 dated 24.6.1999. The Division Bench had held that a clarification issued under Section 28-A was not an adjudication and the clarification could be assailed before the assessing officer and before the appellate authority. In our opinion, the attention of the Full Bench of the Tribunal and the Division Bench of this High Court was not drawn to the various decisions of the Supreme Court referred to above. It has been repeatedly held in those decisions that a clarification or a circular can be challenged under Article 226. It has been pointed out therein that once a clarification or circular is issued by a superior authority, it would be an exercise in futility to ask the assessee to raise an objection to the circular before an inferior authority, vide the Constitution Bench decision of the Supreme Court in Filterco v. CST (supra). Subsequently, it was also held by the Supreme Court that clarifications or circulars could be challenged before the High Court under Article 226 of the Constitution, since the remedies of appeal or revision would be futile or not efficacious. In view of these decisions of the Supreme Court, the views taken by the Full Bench of the Tribunal and by the Division Bench of this Court do not lay down the correct law.

34. In W.A.No.3995 of 2004, the appellant/petitioner was issued a pre-assessment notice on 31.10.2003 for the assessment year 2001-2002 whereby the Commercial Tax Officer proposed to levy tax at 16% on branded pizza based on two earlier clarifications dated 18.08.2001 and 20.12.2002. In the writ miscellaneous petitions (W.P.M.P. Nos. 43943 & 43944 of 2003 in W.P.Nos.36203 & 36204 of 2003) the petitioner had prayed for injunction against this pre-assessment notice, and a Division Bench of this Court granted stay of recovery. Pending the writ petition, the third respondent proceeded to finalise the assessment order with express reference to the above two circulars. Since the earlier writ petitions were pending, the appellant filed W.P.No.6266 of 2004 challenging the assessment order. The learned single Judge dismissed the writ petition on the short ground of an alternate remedy being available to the petitioner.

35. It has already been observed by us that once circular/clarifications are issued by a superior authority, an appellate remedy to a lower authority would be futile, and not efficacious. Hence, we cannot agree with the learned single Judge in this respect.

36. It may be mentioned that the dispute in the present case is only in respect of the tax liability prior to 01.04.2002. As regards the tax liability subsequent to 01.04.2002, the matter is pending before the statutory appellate authorities, and hence, we are not expressing any

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opinion about the same, except to say that the impugned circular should not be treated as binding on the said authorities as they are exercising judicial function.

37. In view of the above, we quash the circular no.156/2003 dated 26.06.2003 insofar as it relates to the tax liability for the period prior to 01.04.2002 to pay sales tax at 16%, and the assessment order dated 10.12.2003. The order of the Tribunal dated 24.11.2003 is set aside. The writ appeal and the writ petitions are allowed. No costs. Consequently, W.P.M.Ps are closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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1. Commissioner of Commercial Taxes
   Ezhilagam, Chepauk,
   Chennai - 600 005.

2. Commercial Tax Officer,
   Valluvar Kottam Assessment Circle,
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3. Tamil Nadu Taxation Special Tribunal
   rep. by its Registrar,
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   Chennai.

+ 2Cc to mr.R.Raghavan, Advocate Sr.6764
+ 1Cc to Spl.Govt. Pleader Sr.7150, 7149

in W.A.No.3995/04 &
W.P.Nos.36203 & 36204
of 2003

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